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In the Supreme Court
OF THE
United States

October Term, 1975

No. 75-1325

Sunkist Growers, Inc.,
Petitioner,

vs.

Pacific Coast Agricultural Export Association
and M-C International, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

QUESTIONS PRESENTED

1. Is the evidence sufficient to sustain the jury's verdict as to injury and damages proximately caused by the antitrust violation?

2. Is the evidence sufficient to sustain the jury's findings that petitioner violated §2 of the Sherman Act by actually monopolizing, attempting to monopolize, and conspiring to monopolize?

(a) Is it within the jury's province to conclude that the petitioner had monopoly power to

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control prices or exclude competition where it had a distribution market share fluctuating between 45% and 70%, an admitted monopoly over the supply market, and faced small insignificant competitors?

3. Is a trade association whose members have assigned their claims to it a proper party to seek injunctive relief under §16 of the Clayton Act?

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is largely a reiteration of its earlier unsuccessful factual arguments made to the jury and subsequently to the Ninth Circuit (P. at 8-14).[1] While Sunkist's petition does not purport to challenge the sufficiency of the evidence, its statement of facts suggests that its position is predicated upon such a contention. The evidentiary issues raised are improperly presented in the petition because it does not refer to, much less explain, all the evidence admitted at trial on those issues. Petitioner simply ignores unfavorable evidence.[2]

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[1]Throughout this brief, "P." refers to the Petition for Writ of Certiorari of Sunkist Growers, Inc., No. 75-1325; "Opinion, P.A." refers to the Opinion of the Court of Appeals for the Ninth Circuit which is an appendix to the above Petition; "R.T." refers to the Reporter's Transcript of the trial as transmitted to the Court of Appeals; "C.T." refers to the clerk's *transcript* of the record on appeal; "P.X.", "S.K.", and "R.X." refer to the trial exhibits of respondents, petitioner Sunkist, and defendant Reliance respectively.

[2]For example:

(a) Petitioner's proffered business reasons for agreeing with Reliance to exclude plaintiffs from the market and appointing Reliance its exclusive agent is at odds with the finding that peti-

The case is correctly stated in the opinion of the court of appeals:

> "Plaintiff-appellant Pacific Coast Agricultural Export Association (the Association) is a Webb-Pomeraine association[1] of fresh fruit exporters who among other things serve as middlemen in exporting oranges to Hong Kong and the Far East. Plaintiff-appellant M-C International, Inc. (M-C) also exports oranges to Hong Kong.
>
> "Defendant and cross-appellant Sunkist Growers, Inc. (Sunkist) is a federated agricultural cooperative comprised of several thousand Arizona and California citrus fruit growers who grow and pack citrus fruits for sale in the United States and abroad. Defendant and cross-appellant Reliance Commercial Enterprises, Inc. (Reliance) conducts business as a broker of citrus fruits in the Far East.
>
> "[1]The Webb-Pomeraine Act [15 U.S.C. §§61-65], allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy an exemption from antitrust liability for that export trade."

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tioner made an agreement with Reliance with a primary purpose of unreasonably excluding the exporters from the market (Opinion, P.A. at 9-10; Appendix attached hereto at i).

(b) Notwithstanding the disclaimers in its petition (P. at 10-11 and n.5), Sunkist used its control over district exchanges, not for legitimate cooperative purposes, but to prevent competition from exporters (C.T. 401, 404; P.X. 74, 78).

(c) The record belies petitioner's claim that as a result of its antitrust violations "a healthy competition between Sunkist and the exporters developed . . ." (P. at 11). After March, 1966, the exporters were prevented by Sunkist from purchasing the oranges they needed for sale in Hong Kong (R.T. 264-65, 845-47, 955, 994, 1055-56, 1092, 1147, 1234-35). The market shares of P.C.A.E.A.'s assignors and M-C in the Hong Kong orange business declined dramatically after the Sunkist-Reliance agreement of February 1966 (P.X. 146-153), and three of those exporters were forced out of the market altogether (P.X. 148, 149, 151).

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"As assignee of the rights of seven of its members, the Association charged Sunkist with violating Section 1 of the Sherman Act [15 U.S.C. §1], by conspiring with Reliance to restrain trade, and with violating Section 2 [15 U.S.C. §2], by conspiring and attempting to monopolize and monopolizing exports from Arizona and California to Hong Kong. In a separate action M-C similarly charged both Sunkist and Reliance. The actions were consolidated for trial by agreement. [footnote omitted]

"The jury returned a general verdict and answered 16 special interrogatories in favor of plaintiffs, finding that Sunkist and Reliance had engaged in each alleged anticompetitive practice. The jury fixed damages at $238,704 for the Association's assignors, and $2,363 for M-C. [footnote omitted]

"The district court thereafter awarded treble damages and attorneys' fees of $205,250. [footnote omitted] It ordered the termination of defendants' exclusive sales agreement, and enjoined Sunkist from refusing to sell oranges through its domestic and export departments to qualified buyers at competitive prices. The court refused to enjoin Sunkist *from selling to* Hong Kong importers, either directly or through nonexclusive agents, and also denied plaintiffs' request that Sunkist be dissolved" (Opinion, P.A. at 3-5).

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ARGUMENT

1. SINCE THE NINTH CIRCUIT ADHERED TO WELL-ESTABLISHED PRINCIPLES THAT A PRIVATE PARTY MUST PROVE INJURY AND DAMAGES RESULTING FROM VIOLATIONS OF ANTITRUST LAW, NO DAMAGE ISSUE IS PRESENTED FOR THIS COURT'S REVIEW EXCEPT THE SUFFICIENCY OF THE EVIDENCE AND, AS TO THAT ISSUE, NO COMPELLING REASON EXISTS FOR YET ANOTHER APPELLATE REVIEW OF EVIDENCE ALREADY FOUND SUFFICIENT BY THE COURT OF APPEALS.

Plaintiff asserts that the issues raised by the Ninth Circuit holding as to injury and damages are similar to those in a case in which this Court has recently granted certiorari, *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.* 523 F.2d 262 (3d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3471 (U.S. February 23, 1976) (No. 75-904) *sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* Petitioner's own characterization (P. at 15) of the *Brunswick* case indicates the erroneousness of that assertion. There the Third Circuit permitted a plaintiff to recover damages in the absence of any proof of injury.[3] This Court has granted certiorari on that issue (44 U.S.L.W. 3471).

---

[3]In *Brunswick,* the plaintiff abandoned its Sherman Act § 1 claim and the jury rejected its Sherman Act §2 claim. *NBO Industries Treadway Cos., Inc. v. Brunswick Corp., supra,* 523 F.2d at 265. The only violation of the antitrust laws found was that of Clayton Act §7 and the Third Circuit concluded that damages were recoverable even if that violation was premised only upon the *potential* lessening of competition. *Id.* at 268, 271-73. In the present case, damages are not predicated on future possibilities but upon past violations and impact, the jury having found and the Ninth Circuit having affirmed that petitioner violated both Sherman Act §§ 1 and 2 to the injury of respondents.

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In contrast to the Third Circuit's novel approach, the Ninth Circuit in this case simply applied the well-established principle that a party must prove injury and damage to maintain his action under §4 of the Clayton Act:

> "Sunkist correctly notes that a private antitrust verdict cannot be sustained without proof of injury. (citation omitted) The district court so instructed the jury as to each charge, and the requirement was reiterated as to each charge in the written interrogatories.
>
> "Sunkist argues *inter alia* that the appellants' damages did not arise proximately from the alleged illegal activity . . . .
>
> "A. *Damage Causation.*
>
> "Sunkist's contention . . . is that plaintiffs lost no sales or profits from insufficient supply of export 'pool' oranges, since they would not have purchased them even if they were available. . . . [T]he jury could reasonably conclude . . . that either the refusal to sell export 'pool' oranges, or the restriction of plaintiffs' ability to purchase domestic 'brand' oranges, or a combination of both, proximately led to diminution of plaintiffs' market share. Such clearly constitutes 'reasonable probability [of] the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue.' (citations omitted)" (Opinion, P.A. at 15-16).

Yet, in the face of this textbook application of the basic antitrust law requirement for damage recovery, petitioner claims that the Ninth Circuit allowed the verdict to stand by "removing any require-

ment of proof of injury resulting from the alleged violation" (P. at 17). This characterization is inexplicable.[4]

Petitioner's attack on the method of proving damages is even more tenuous. It is simply a reiteration of the argument already rejected by the Ninth Circuit that respondents' damage projections were improper. Respondents measured damages by projection of their actual market shares prior to the violation to the actual market sales figures for the period in question. As the Ninth Circuit noted (Opinion, P.A. at 18), the propriety of that method of measuring damages was clearly established by the "before and after" test sanctioned by this Court in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 259-63 (1946). Further, in factual situations strikingly similar to the present case, courts have approved damages measured by projection of previously existing market shares to the actual market figures for the period. *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 903-04 (5th

[4]Petitioner's reference (P. at 16-17) to the court of appeals' discussion of the sufficiency of the evidence with respect to the jury's finding that defendants unlawfully agreed to unreasonably restrain trade under §1 of the Sherman Act is misplaced. It confuses the appellate court's discussion as to what makes defendants' conduct illegal under §1 with what satisfies the requirements of proving injury and damage. The court of appeals, however, carefully distinguished between the two by specifically stating at the outset of the portion of the opinion to which petitioner refers (Opinion, P.A. at 9 n.9) that issues as to proof of damage causation and amount were discussed elsewhere in the opinion. Petitioner's attempt to create an issue for this Court's review by taking statements out of context should be disregarded.

In any event, petitioner has not requested this Court's review of the sufficiency of the evidence as to the §1 violation itself and the Ninth Circuit's careful evaluation of such evidence (Opinion, P.A. at 9-10) eliminates any need for such an inquiry.

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Cir.), *cert. denied,* 412 U.S. 923 (1973); *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.,* 383 F.2d 97, 106 (5th Cir. 1967); *accord, Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 22-24 (5th Cir.), *cert. denied,* 419 U.S. 987 (1974) [damage proof may include estimates based on assumptions as to disputed facts].

As the Ninth Circuit's opinion noted (Opinion P.A. at 18-19), the use of the "before and after" method of measuring damages was properly utilized because there was a sufficient factual "showing that the market conditions in the two periods were similar but for the impact of the violation" (Opinion, P.A. at 18).

Nonetheless, petitioner attempts to resurrect the argument—rejected by the Ninth Circuit—that it was improper to allow respondents to establish damages during the violation period based upon their pre-existing shares because respondents' diminished market shares during the violation period might have resulted from legitimate competition by Sunkist.

Petitioner's reading of the Clayton Act to allow a defendant immunity from damages, due to the *possibility* that such defendant could have captured the same share of the market legally, is ridiculous. The Clayton Act protects a defendant against paying damages only if its violations of the antitrust laws did not result in any injury to plaintiff. "Defendants' illegal seizure of a market share to the plaintiffs' injury is not protected merely because the defendant might have achieved the same result by legal means" (Opinion, P.A. at 17). Acceptance of petitioner's

argument is tantamount to condoning the theft of a sum of money on the ground that the thief could have earned it legally.

Further, the evidence was conflicting as to whether petitioner would have entered the market but for its illegal activities and agreement with Reliance, and the jury obviously concluded that Sunkist would not have done so (Opinion, P.A. at 17).[5]

Finally, irrespective of the sufficiency of respondents' evidence as to damage measurement, petitioner's own evidence independently sustains the amounts of the damage verdicts (R.T. 6954-76, 7005-28, 7082-83). Petitioner introduced evidence upon which the jury could project lost sales by respondents during the relevant period in amounts sufficient to sustain the damage award (S.K. 2591-E, 2609-C, 4301, 4302, 4305, 4305-A, 4306, 4306-A). For example, Professor Davis' testimony relating to the elasticity of demand reduces respondents' sales projections by only approximately 10 percent (R.T. 4478-89); the resultant damages are far in excess of those awarded.

---

[5]Petitioner offered evidence and cross-examined respondents on the supposition that Sunkist would have been in the market anyway, presumably legally (R.T. 6823-954; S.K. 2591-F). Even so, there is no evidence that Sunkist would have made direct sales in Hong Kong absent its illegal agreement with Reliance. For example, shortly before the illegal agreement with Reliance, Authenrieth (Sunkist's Export Sales Manager) expressed his opinion as to the advisability of continuing to deal through the exporters (P.X. 117). Petitioner is therefore wrong in asserting that this issue—as to whether or not Sunkist would have entered the market but for the illegal conspiracy—was not raised at trial (P. at 19).

2. THE COURT OF APPEALS PROPERLY AFFIRMED THE JURY'S FINDING THAT PETITIONER MONOPOLIZED IN VIOLATION OF §2 OF THE SHERMAN ACT AND, IN ANY EVENT, THE FINDINGS THAT PETITIONER ATTEMPTED TO MONOPOLIZE AND CONSPIRED TO MONOPOLIZE INDEPENDENTLY SUSTAIN THE VERDICT THAT PETITIONER VIOLATED §2 OF THE SHERMAN ACT.

Petitioner requests that the Court review the Ninth Circuit's affirmance of the jury's verdict that it monopolized in violation of §2 of the Sherman Act.

First, that request for review is inappropriate because the issue as to actual monopolization of the market, no matter how resolved, will have no effect upon the result in this case. In addition to finding that petitioner violated §2 by actual monopolization, the jury specifically found and the court of appeals specifically affirmed that petitioner attempted to monopolize *and* conspired to monopolize in violation of §2 of the Sherman Act (Appendix attached hereto at iii-v; Opinion, P.A. at 13-15). Petitioner raises no issue as to the propriety of the findings that it attempted and conspired to monopolize.[6] Accordingly, no useful purpose would be served by this Court's review of a question which could have no possible effect upon the result in the case. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 182-24 (1959).

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[6]Nor is any issue as to the market share required for actual monopolization relevant to such findings. For example, it has been held that proof of relevant market and/or market power is not essential in a conspiracy to monopolize charge. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961).

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In any event, the Ninth Circuit properly held that it was within the jury's province to find that Sunkist monopolized the market for oranges grown in Arizona and California for export to Hong Kong. Petitioner claims that "the opinion below significantly expands the test of monopoly power set forth in *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966) by sustaining a finding of monopoly power based solely on a market share of 45-62%" (P. at 20).[7] In fact, the court of appeals affirmed the jury's finding that Sunkist had monopolized the market for oranges grown in Arizona and California for export to Hong Kong on the basis of the criteria set forth by this Court in *Grinnell*.

In doing so, the court correctly noted that while a market share which fluctuated between 45% and 70% is not itself conclusive of the existence of monopoly power, such market share was sufficient when taken into account with other factors to support a finding of power to exclude competition or control prices (Opinion, P.A. 11-12).

Specifically, the court of appeals noted that Sunkist acknowledged its control over the supply market (Opinion, P.A. at 13). As noted by the court of appeals and petitioner, Sunkist's members control approximately 75% of the oranges grown in California and Arizona (P. at 8, 20; Opinion, P.A. at 5). Contrary to the petitioner's assertion (P. at 21-22), the

[7]In this regard, the petition misstates the opinion of the Ninth Circuit, which spoke of petitioner's control of the relevant market as ranging between 45% and 70%, not 62% (Opinion, P.A. at 12).

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Ninth Circuit expressly articulated the significance of that fact in terms of petitioner's power to control prices or exclude competition:

> "Rather, plaintiffs attempted to show, and did show, that Sunkist's control of supply was employed to extend its monopoly illegally into distribution" (Opinion, P.A. at 11).

See *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377 (1973); *Poster Exch., Inc. v. National Screen Serv. Corp.,* 431 F.2d 334, 339-40 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971).

That conclusion is supported by evidence, including the testimony of petitioner's own Export Sales Manager, that Sunkist's control over the supply market is intrinsically intertwined with its control over the oranges exported to Hong Kong. *E.g.,*

> "Q. Now prior to March, 1966, what market share of California-Arizona oranges sold in Hong Kong had been controlled by Sunkist?
>
> A. Well, a very substantial share. I'm afraid I can't give you a number.
>
> Q. 75 to 85 percent?
>
> A. Are we talking about what reached the Hong Kong market or on this side?
>
> Q. The supply on this side.
>
> A. Oh, it was the same.
>
> Q. 85 percent?
>
> A. Yes." (R.T. 2564-68)

Petitioner used its control over the supply market to exclude competitors. For example, Sunkist demanded 85 percent of the shipping companies' refrigeration space by pointing out that it controlled 85 percent of the supply of California-Arizona oranges (R.T. 2547-56, 2564-69; P.X. 36, 56).

The court of appeals also correctly evaluated petitioner's power to control prices or exclude competition in light of the diminishing number of competitors which were small in size (Opinion, P.A. at 11-12). The market shares of P.C.A.E.A.'s assignors and M-C in the Hong Kong orange business declined dramatically after the Sunkist-Reliance agreement of February 1966 (P.X. 146-153), and three of those exporters were forced out of the market altogether (P.X. 148, 149, 151).

The significance of Sunkist's size in comparison with that of the small exporters and Sunkist's ability to exclude the exporters as competitors at will was acknowledged by Sunkist in a letter written to its co-defendant Reliance: "I must confess that we have proceeded softly on this controversial issue because we decided it was more important for us not to create the image of Sunkist as a giant power wiping out many small exporters with one blow" (P.X. 56).

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3. UNDER WARTH v. SELDIN, 422 U.S. 490 (1975), THE NINTH CIRCUIT'S CONCLUSION THAT AN ASSOCIATION WHOSE MEMBERS ASSIGNED THEIR CLAIMS TO IT HAD STANDING TO SEEK EQUITABLE RELIEF WAS PROPER AND, IN ANY EVENT, THE INJUNCTION WILL REMAIN IN EFFECT WHETHER OR NOT THE ASSOCIATION IS A PROPER PARTY THERETO.

Sunkist seeks review by this Court on the basis of a misstatement as to the holding of the court of appeals. Contrary to Sunkist's petition, the Ninth Circuit did not reach a general conclusion that an "Association can seek injunctive relief on behalf of its members even though it was not itself threatened by antitrust violations" (P. at 23).

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Instead the court of appeals' conclusion was highly specific: where an association receives an assignment of members' claims, "the assignee association may seek whatever equitable relief may be available to each assignor" (Opinion, P.A. at 22).[8] General principles as to the assignability of claims are applicable to antitrust cases. Opinion, P.A. at 20; *South Carolina Council of Milk Producers, Inc. v. Newton,* 241 F. Supp. 259, 265 (E.D.S.C. 1965), *rev'd on other grounds,* 360 F.2d 414 (4th Cir.), *cert. denied,* 389 U.S. 934 (1966); *Northern California Monument Dealers Association v. Interment Association of California,* 120 F. Supp. 93, 94-95 (S.D. Cal. 1954). Since the members' assignment was valid and intended to convey their claims, which included rights to equitable relief, the association was a real party in interest under Rule 17(a), Fed. R. Civ. P. (Opinion, P.A. 20-22).

For that reason, the Ninth Circuit decision in the present case in no way conflicts with *Nassau Cty. Ass'n of Ins. Agts., Inc. v. Aetna Life & Cas. Co.,* 497 F.2d 1151, 1153-54 and n.4 (2d Cir. 1974), *cert. denied,* 419 U.S. 968 (1974) (associations had no standing to bring treble damage action where there was no injury suffered as a result of defendants' practices, no showing that associations were in the target area of defendants' actions, associations did not do business or compete with defendants; no claim

[8]The court of appeals also stated that petitioner's failure to timely object that the Association was not a proper party to seek injunctive relief cast doubt on the argument that injunctive relief was barred (Opinion, P.A. at 20 n.16). This issue was never raised until 4½ years after the filing of the complaint (*id.*), and approximately four months after the jury verdict.

of an assignment of members' rights was asserted)[9], or with *Farmers' Co-op Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 103 (8th Cir. 1942) (a cooperative corporation cannot maintain an action for treble damages to its members).

Moreover, even without assignment of members' claims, this Court recently has indicated that an association is a proper party to pursue injunctive relief as representative of its members when such prospective relief will redound to the benefit of the members. In *Warth v. Seldin*, 422 U.S. 490 at 511, 515 (1975), the Court said:

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members. *E.g., National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. [*Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972)]. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members entitled to invoke the court's jurisdiction.
>
> * * *

[9]Moreover it is doubtful that the footnote of the decision upon which petitioner relies (see P. at 23, citing to 497 F.2d at 1154 n.4) retains any vitality in light of this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975).

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> "As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. *E.g., Sierra Club v. Morton,* 405 U.S. 727 (1972). But, apart from this, whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *E.g., National Motor Freight Assn.* [*v. United States*], 372 U.S. 246 (1963). See *Data Processing Service v. Camp,* 397 U.S. 150 (1970). Cf. Fed. Rule Civ. Proc. 23(b)(2)."

Here Sunkist concedes and the court of appeals found that members themselves had standing and the injunctive relief will inure to the benefit of the members (P. at 24 and n.16; Opinion, P.A. at 21). Accordingly, Sunkist's argument that the Association was an improper party to obtain injunctive relief is erroneous whether tested by the general rules as to the rights of an assignee or by this Court's articulation of an association's right to obtain injunctive relief which will redound to the benefit of its membership.

Further, the district court granted the subject injunctive relief to M-C in its lawsuit as well as to the

Association (Opinion, P.A. at 4-6, 36-37). M-C's standing, as an individual exporter, to obtain the subject equitable relief was not challenged. Accordingly, the injunction remains in effect whether or not the Association is a proper party thereto.[10]

As the court of appeals' opinion indicated, Sunkist contended that without the Association "the *de minimis* damage suffered by M-C ($2,363) does not in equity justify the extensive injunction relief granted" (Opinion, P.A. at 20). In effect, Sunkist argued that a party awarded $2,363 as actual damages suffered by reason of defendants' antitrust violations is not entitled to an injunction to prohibit future violations. Because of its conclusion that the injunctive relief was properly granted to the Association, the court of appeals did not find it necessary to dispose of this contention.

However, the language of §16 of the Clayton Act (15 U.S.C. §26) is dispositive of Sunkist's claim that there is a necessary relationship between the dollar value of past damages and the availability of future injunctive relief:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having

[10] "While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *State of Hawaii v. Standard Oil of California*, 405 U.S. 251, 262 (1972).

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> jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by the courts of equity . . . ."

Damages are for past conduct; an injunction goes to future conduct. A plaintiff can receive a million dollars for past conduct but still not be entitled to injunctive relief if there is no threat of continued illegal activity. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 868 (N.D. Cal. 1975); *see generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129-33 (1969). Conversely, an injunction may be proper where no damages have been awarded; *i.e.*, where plaintiff complains of no past conduct but simply points to a dangerous probability of future injury as a result of anticipated future conduct of the defendant. *See, e.g., Bedford Cut Stone Co. v. Journeyman Stone Cutters' Assn.*, 274 U.S. 37, 55 (1927); *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F.Supp. 888, 898-99 (S.D.N.Y. 1948).

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, San Francisco, California,
April 21, 1976.

Respectfully submitted,

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(Appendix Follows)

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